

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1487

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSE NUNEZ,

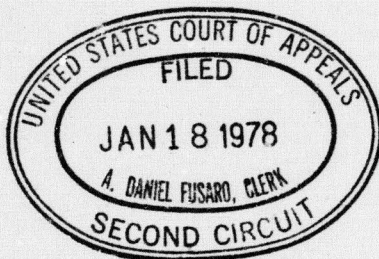
Defendant-Appellant.

*orig. B
P/S*

Docket No. 77-1487

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
JOSE NUNFZ,
Defendant-Appellant.

Docket No. 77-1487

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether the maximum probation period imposable on a split sentence (18 U.S.C. §3651) may not exceed the portion of the original sentence which has been suspended.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable George C. Pratt) entered November 18, 1977, denying defendant-appellant's motion pursuant to Rule 35, Federal Rules of Criminal Procedure, for a reduction of the probation term imposed under a split sentence, 18 U.S.C. §3651 (12), on the ground that the probation term imposed was illegal.

On February 17, 1977, defendant-appellant was convicted, after a jury trial, of possession of counterfeit Federal Reserve notes with intent to defraud (18 U.S.C. §472), and was sentenced to a prison term of three years, six months to be served in a jail-type institution and the balance of the sentence suspended, with a four-year probation term to commence upon defendant's release from confinement. Defendant is currently serving the jail portion of this split sentence.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Defendant-appellant Jose Nunez was convicted, after a

jury trial, of possession of counterfeit Federal Reserve notes with intent to defraud (18 U.S.C. §472). His appeal to this Court resulted in an affirmance on June 23, 1977.* A petition for writ of certiorari was denied on October 3, 1977.**

Mr. Nunez filed a motion returnable November 3, 1977, seeking a reduction of a portion of his sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Mr. Nunez had been sentenced, under the split sentencing provision in 18 U.S.C. §3651(12), to a prison term of three years, six months to be served in a jail-type institution and the balance of the sentence suspended, with a four-year probation term to commence upon defendant's release from confinement. The sentencing statute reads:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such

*A copy of the order of affirmance is "D" to the separate appendix to defendant-appellant's brief.

**A copy of the letter advising counsel that certiorari had been denied is "E" to defendant-appellant's separate appendix.

period and upon such terms and conditions as the court deems best.

In his Rule 35 motion, Mr. Nunez argued that his four-year probation term was illegal and should be reduced to two and one-half years, because the maximum probation period imposable on a split sentence may not exceed the portion of the original sentence which has been suspended. The argument proceeded from the premise that the statute is ambiguously worded -- the phrase "for such period" (the length of the probation term) could modify either the preceding phrase relating to the portion of the sentence which had been suspended or the succeeding phrase relating to the court's exercise of discretion. That being so, the proper interpretation of the length-of-probation provision should be to limit the probation portion to the period suspended, consistent with the purposes of the split sentence statute and the legal requirements of such a sentence.

In a memorandum and order filed November 18, 1977,* Judge Pratt declined to modify the probation term. He found:

Contrary to defendant's argument, the plain language of the statute clearly indicates a congressional intent that the words "such period" relate to the subsequent words "as the court deems best," and not to the preceeding [sic] words, "the remainder

*A copy of the entire memorandum and order of the district court appears as "B" to defendant-appellant's separate appendix.

of the sentence." Any possible doubt is removed by the identical language which Congress used in the first paragraph of §3651. Clearly, Congress intended in §3651 that if a court imposes probation, its length, as well as its terms and conditions (up to a maximum of five years), lie within the sentencing court's discretion.

Appendix B at 2.

Mr. Nunez appeals that ruling.

ARGUMENT

THE MAXIMUM PROBATION PERIOD IMPOSABLE
ON A SPLIT SENTENCE (18 U.S.C. §3651)
MAY NOT EXCEED THE PORTION OF THE ORI-
GINAL SENTENCE THAT HAS BEEN SUSPENDED.

Paragraph 2 of 18 U.S.C. §3651 provides a procedure for splitting a single sentence, imposed on a single indictment count, into a jail component and a probation component. The statute is clear as to the length of the jail portion: it may not exceed six months. However, as to the probation portion, the language of the statute is not clear: it may be read so that the phrase "for such period" (the probation period) refers to the preceding phrase relating to the suspended portion of the sentence; or it may be read so that the phrase "for such period" refers to the succeeding phrase relating to the exercise of judicial discretion. Though similar language in the first paragraph of the statute was cited by the district judge as evidence that, regardless of the period of suspension, the

sentencing judge may impose up to five years' probation, the split sentence provision is unique and may not be interpreted solely by reference to a straight probation provision.

That the period of probation should be limited to the term suspended -- that the phrase "for such period" should be read with the preceding clause -- is the only way of assuring that a split sentence on a single count will constitute only one sentence and not two. The split sentence provision was enacted as Pub.L.No. 85-741 (72 Stat. 834) and is entitled "One-Count Indictment -- Confinement," and Senate Report No. 2135 (reprinted in 1958 U.S. Code Cong. & Admin. News 3841-3843) expresses the purpose of the statute as authorizing two forms of punishment, previously available only on multiple-count convictions, on a single count. Congress, understanding that only one sentence may be imposed on each count, was undoubtedly aware that a split sentence for a single count would be permissible only insofar as it constituted a single sentence.

Implicit, therefore, in the interpretation of this statute is the requirement that a defendant who receives a split sentence of probation and jail does not receive a sentence greater than the sentence which is authorized or imposed under the separate probation provisions. This can be achieved only by limiting the probation period to the term suspended. To fail to require this limitation would be to authorize a sentence above the maximum probation sentence of five years -- five years' probation as well as six months in jail -- despite the fact

that there was never a violation of probation. The interpretation offered herein of the ambiguous statutory language is implicitly supported by United States v. Teresi, 484 F.2d 894 (7th Cir. 1973), in which the court noted:

18 U.S.C. §3651, second paragraph, would authorize a sentence of imprisonment of three years, with confinement for six months, execution of two and one-half years suspended, and defendant placed on probation for such period, subject to the condition stated....

Id., 484 F.2d at 897.

Thus, defendant-appellant's three-year sentence should have been split similarly: six months' confinement, two and one-half years suspended, and an identical period -- two and one-half years -- on probation, subject to any special conditions.* The four-year probation period should therefore

*Furthermore, should this Court find that this analysis does not elicit an unequivocal interpretation of this ambiguous statutory language, the shorter probation term should be read into the statute under the doctrine of lenity. The Supreme Court has held:

[A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971) [additional citations omitted].... Thus, where there is an ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404 U.S. 336, 347-348 (1971).

Thus, our interpretation, which would result in more lenient sentencing consequences by limiting the length of the probationary term imposable under a split sentence, should be adopted to resolve the ambiguity.

be reduced to two and one-half years.*

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the case remanded with instructions to reduce the probation term to the length of time equivalent to the suspended portion of the sentence originally imposed.

Respectfully submitted,

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*This issue has never been considered by this Court in a written decision. Subsequent to our filing of the Rule 35 motion in the district court, this Court affirmed, in an unreported decision, a judgment on appeal in which this was one of the issues raised.

CERTIFICATE OF SERVICE

January 18, 1978

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven Lloyd Sarnat